

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

APR 1 1997

PATRICK FISHER
Clerk

RANDOLPH JOHN AMEN,

Plaintiff-Appellant,
vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 96-5146
(D.C. No. 95-C-4-H)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before BRORBY, EBEL, and KELLY, Circuit Judges. **

Mr. Amen appeals from the district court's dismissal of his complaint against the United States based upon the magistrate's report and recommendation, I R. doc. 67, the magistrate's order denying him leave to file a second amended complaint, I R. doc. 68 and the district court's decision to dismiss 31 parties for misjoinder, leaving only the government remaining. Aplee. App. 60-61 (doc. 49). He also seeks leave to proceed on

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

appeal without prepayment of costs or fees.

Our review of the district court docket sheet indicates that Plaintiff was not granted leave to proceed in forma pauperis [IFP] in that court. I R. doc. 2, 33 (denying reconsideration for leave to proceed IFP), & Clerk's Minutes of 5/26/95 "USA questions whether filing fee has been pd will be addressed by Ct." Our inquiry of the district court clerk indicates that Mr. Amen has not paid the district court filing fee. See 28 U.S.C. § 1914(a). Given these facts, the district court should have dismissed the complaint without prejudice. Although a district court's decision denying leave to file IFP status is appealable, Ragan v. Cox, 305 F.2d 58, 59 (10th Cir. 1962), no appeal has been taken on that ground.

Subsequently, the district court denied Plaintiff's motion for leave to appeal in forma pauperis. I R. doc. 75. That matter is now before us. Based on the foregoing, Plaintiff's motion to proceed on appeal without prepayment of costs or fees is DENIED, see 28 U.S.C. § 1915(e)(2); LaFevers v. Saffle, 936 F.2d 1117, 1120 (10th Cir. 1991), and the matter is REMANDED to the district court with instructions to VACATE its merits orders and enter a judgment of dismissal without prejudice within 30 days. Upon compliance therewith, the appeal shall be DISMISSED.

IT IS SO ORDERED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge